FOR ARGUMENT

No. 78-1918

In the Supreme Court of the United States

OCTOBER TERM, 1979

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

PPG INDUSTRIES, INC., AND CONOCO, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Under our view of Section 307(b)(1), all preenforcement review is by the courts of appeals.[1] If the record is inadequate for such review, the court of appeals may remand to the agency for a more complete record. Although PPG repeatedly characterizes our interpretation as "extreme" and as "contradictory and conflicting" (Br. 2, 17), our construction is far more practical than the complicated scheme offered by PPG.

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[1]Once the agency commences administrative enforcement proceedings under Section 113, preenforcement review is no longer available (see our opening brief at 26 n.19). 42 U.S.C. (Supp. I) 7413(a).

Under PPG's interpretation, jurisdiction depends entirely on the form of the record of the challenged administrative action. If the agency action was based on a "contemporaneously compiled administrative record" (Br. 24), then review lies only in the courts of appeals. If the record is of lesser quality, then only the district courts have jurisdiction (under 28 U.S.C. 1331).[2] Of necessity, each "final action" case would require a preliminary evaluation of the substance of the record to determine which court had original jurisdiction. What is more, the two courts might not agree. No decision to take jurisdiction by a district court would ever be certain until appellate review confirmed it. An erroneous decision by a district court to assume jurisdiction would invite enormous and wasteful discovery and other proceedings. An erroneous decision by a court of appeals to assume jurisdiction would waste its time, the litigants' time, perhaps this Court's time, and inevitably delay reaching the merits. In short, a constant shuttle between courts is an unavoidable consequence of PPG's interpretation.[3] By construing Section 307(b)(1) to place judicial review of all final actions of the Administrator in the courts of appeals, such wasteful exercises are wholly eliminated.[4]

[2]Congress knows exactly how to make a broad grant of jurisdiction to courts of appeals, and yet preserve limited district court jurisdiction when that is intended. In the judicial review provision of the Safe Drinking Water Act, Pub. L. No. 93-328, 88 Stat. 1689, 42 U.S.C. 300j-7, enacted in 1974, prior to the amendments to Section 307(b)(1), Congress placed jurisdiction to review certain enumerated actions in the court of appeals for the District of Columbia. The regional courts of appeals were given jurisdiction to review the promulgation of "any other regulations," issuance of "any order," or the Administrator's actions in "making any determination" under the Act.

Congress, however, specifically placed review in the district courts of actions granting or refusing exemptions or waivers under the Act. Otherwise, review of those actions would have been in the regional courts of appeals under the broad terms of their jurisdiction.

2. The premise of PPG's argument is that the specifically enumerated items in Section 307(b)(1) are actions that the Act (or the Administrative Procedure Act) requires to be made on what PPG variously describes as a "definite and contemporaneously compiled record," a "complete and contemporaneously compiled record" a "comprehensive administrative record;" and an "explicit administrative record" (Br. 26, 27, 37, 38). Therefore PPG concludes that "any other final action" must likewise be based on such a record. There are two main flaws in this argument.

(a) Although what PPG means by its label of a "contemporaneous" and "definite" record is unclear, the fact is that any agency action reviewable under the Act,

[3]The jurisdictional uncertainty avoided by our view is quite separate from the promptness it fosters in obtaining final decisions on judicial review. In this latter connection, PPG suggests, by citing a law review article (Br. 58), that initiating judicial review in district courts would not delay ultimate resolution of the merits and would not strain judicial and litigants' resources since appeals would be infrequent. The quoted portion of the article, however, refers only to the possibility of direct review in social security cases. Currie and Goodman, *Judicial Review of Agency Action: Quest for the Optimum Forum*, 75 Colum. L.Rev. 1, 25 (1975). We believe that the discovery in district courts contemplated by PPG (Br. 54) in the name of "verifying" the agency record would severely tax the resources of litigants and the district courts and that appeals would still be taken—on such voluminous records—to the courts of appeals.

[4]Our construction also avoids the incongruous result of construing "final action" in completely different ways under the Clear Air Act and the Administrative Procedure Act, 5 U.S.C. 704. PPG does not address this inconsistency.

however informal, must be based on an administrative record. Where judicial review of agency action is laid in the courts of appeals, 28 U.S.C. 2112(a) provides that the agency must file the administrative record with the court of appeals in "all proceedings instituted in the courts of appeals to * * * review or enforce orders of administrative agencies * * * and officers * * *." 28 U.S.C. 2112(b) provides that the record must include, among other things, the agency's order, the findings or report on which that order is based, and any pleadings, proceedings or evidence before the agency. If the court subsequently determines that non-included portions of the record are necessary for its review, the court may direct that the record be supplemented. 28 U.S.C. 2112(b). Rules 15 and 16 of the Federal Rules of Appellate Procedure, also authorized by 28 U.S.C. 2112, detail the manner of petitioning the court on direct review and the composition of the record for review of agency action. Thus, even the most informal agency action under the Act will be presented to the courts of appeals with a sufficient record. That procedure was followed here[5] and is ordinarily followed in all cases of judicial review of "informal" agency action.[6]

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[5]Contrary to PPG's argument (Br. 51 n.47), records of rulemaking under 5 U.S.C. 553 are not necessarily "formal." Rulemaking proceedings under 5 U.S.C. 553 must be based on a formal record only if required by other statutes to be made "on the record" after an agency hearing. Otherwise, Section 553(c) requires only that the affected party be given notice and an opportunity to submit written data or argument. *United States* v. *Florida East Coast Ry.* 410 U.S. 224, 238-240 (1973). The administrative record for review is compiled as directed by 28 U.S.C. 2112.

[6]Moreover, the quality of the administrative record should not determine whether review is more appropriate in the district courts or the courts of appeals. Ordinarily, even in the district courts when the administrative record is too skeletal for review, the district court may not permit discovery and trial de novo but must remand to the agency for a more complete record. The only exceptions are where the agency's fact-finding procedures are inadequate or and where the district court proceedings are enforcement proceedings. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

(b) Contrary to PPG's premise, moreover, not all the specifically enumerated items in Section 307(b)(1) are required to be based on a "formal" record. Significantly, PPG admits (Br. 50) that the Administrator's orders under Section 112(c) are specifically made reviewable under Section 307(b)(1) in the regional courts of appeals, even though the Act does not require such action to be based on notice and a hearing or a formal record. It is obviously speculation by PPG (Br. 54) to dismiss this inconsistency in its argument with the curt suggestion that Congress must have wanted "special review," regardless of the form of the record, merely because the Section 112(c) agency action involves "hazardous pollutants." In addition, PPG incorrectly states (Br. 53) that any order under Section 111(j) must be preceded by notice and an opportunity for a hearing.[7] Only an order granting a waiver under Section 111(j) must be preceded by notice and a public hearing. 42 U.S.C. (Supp. I) 7411(j). An order *denying* a waiver may be made by the Administrator without formal proceedings. Such denials fall within the phrase "*any* order under Section 111(j)" made reviewable in the regional courts of appeals by Section 307(b)(1). Similarly, an order issued by the Administrator under Section 119(a), 42 U.S.C. (Supp. I)

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[7]Section 111(j)(1)(A) provides that the owner or operator of a new stationary source may request a waiver from the applicable standards for such sources in order to use innovative technology or continuous emission reduction systems. 42 U.S.C. (Supp. I) 7411(j)(1)(A)

7419(a), denying an application for a primary nonferrous smelter order, is not subject to notice-and-hearing requirements, but is explicitly reviewable by the terms of Section 307(b)(1) in the courts of appeals.[8]

3. PPG (Br. 40-43) creates an illusory conflict between our interpretation of Section 307(b)(1) and two other provisions of the Act. First, Section 206(b)(2)(B) provides that a manufacturer may challenge in the courts of appeals (i) the Administrator's prototype testing for new vehicles or engines and (ii) suspension or revocation of a certificate of conformity for new vehicles or engines. 42 U.S.C. (Supp. I) 7525(b)(2)(B). PPG argues (Br. 42) that our interpretation of "any other final action" repeals the review provision of Section 206(b)(2)(B). Not so. To begin with, PPG neglects to mention that whatever problem Section 206(b)(2)(B) poses to our construction is equally posed to PPG's theory. Section 206(b)(2)(B)(i) requires agency proceedings to be "on the record," a statutory feature that would trigger review under the "any other final action" clause even under PPG's view of Section 307(b)(1).[9] More importantly, Section 206(b)(2)

[8]Individual owners or operators of a primary nonferrous smelter are allowed under Section 119(a)(1), 42 U.S.C. (Supp. I) 7419(a)(1), to have the compliance date for emission limitations for sulfur oxides postponed under specified conditions. Section 307(d), specifying rulemaking procedures for certain actions of the Administrator, recognized the existence of Section 119 orders denying action and exempts such orders from any rulemaking procedures. 42 U.S.C. (Supp. I) 7607(d)(1)(G).

[9]Section 307(e) provides that nothing in the Act "shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." This provision could hardly have been intended to nullify the judicial-review provision expressly authorized by Section 206(b)(2)(B). PPG argues (Br. 43 n.40) that Section 307(e) was only intended to prohibit review in citizen suits of issues that may be reviewed on preenforcement review. See PPG App. 5a. This appears to be correct, although there is little legislative history on the issue.

is fully consistent with our construction. Since Section 206(b)(2)(B) establishes a specific review mechanism for the agency action it describes, that provision is obviously controlling for that type of action over the more general "any other final action" language of Section 307(b)(1). *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 228-229 (1957); cf. *Preiser* v. *Rodriguez*, 411 U.S. 475 489-490 (1973).[10]

Second, PPG argues that our construction nullifies the parenthetical exception from review in Section 307(b). Not so again. The parenthetical material exempts from review any "standard required to be prescribed under Section 202(b)(1)." Our interpretation does not resubject such standards to review. Once again, the specific exclusive language of the parenthetical concerning a specific type of agency action controls over the general inclusive language of "any other final action."[11]

[10]Both Section 206(b)(2)(B) and Section 307(b)(1) provide for review in the courts of appeals under similar procedures. The only difference is in the venue allocations. Section 206(b)(2)(B) lays venue in the circuit wherein the manufacturer has its principal place of business or resides.

[11]The "standards" referred to in the parenthetical are not subject to any preenforcement review. This is understandable inasmuch as those standards are statutorily set by Section 202(b)(1) and are not set by EPA. Section 202(b)(1)(A) requires that certain regulations "shall contain standards which provide that [certain] emissions * * * may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per [redacted] vehicle mile of carbon monoxide." Section 202(b)(1)(B) requires that the regulations for certain nitrogen oxide emissions require "standards which provide that [certain] emissions * * * may not exceed 2.0 grams per vehicle mile." There is no point in authorizing judicial review of standards not set by EPA but by Congress.

4. PPG tries to make much (Br. 32-33) of the fact that the House Committee did not expressly endorse or reject Recommendation E of the Administrative Conference. That recommendation dealt with subject-matter jurisdiction under the Clean Air Act only by suggesting that the parenthetical omission for new-car standards be dropped and that such standards be added to the list of specifically enumerated items. Since Congress did not eliminate this exception, it is understandable that Recommendation E dealing with "Actions Subject to Court-of-Appeals Review" was not expressly approved. Had the Administrative Conference recommended that an "any other final action" clause be inserted, the House Report no doubt would have addressed it. No such recommendation was made, and it is unilluminating to try to divine some meaning from the failure of the House Report to address a recommendation that really does not fit the action later taken by Congress.[12] Perhaps the most compelling response to PPG's argument that only venue changes were intended is that even PPG admits that the "other final action" clauses expanded the subject-matter jurisdiction of the courts of appeals. How far it was expanded is the basic question, and the Administrative Conference recommendations and the references to them by the House Committee do not really supply a direct answer.

[12]Similarly, had Congress really intended to adopt only the "venue" recommendation of the Administrative Conference, it would simply have provided that action "approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged," the only recommended change in venue suggested by the Conference (see PPG App. 8a). That Congress did not limit itself to this narrow change shows that it went well beyond the narrow venue recommendation of the Conference.

In this connection, PPG states (Br. 36-37) that the Administrative Conference "pointed to one common characteristic, shared by each section enumerated in Section 307(b)(1) (pre-1977 Amendments)" and that "[t]hat common element was that each of the specified actions of the Administrator had to be taken in compliance with the Administrative Procedure Act and then would have been taken upon a complete and contemporaneously compiled administrative record." Evidently, PPG's point is that Congress meant to carry this scheme forward in the 1977 Amendments. No such statement, however, appears in the report of the Administrative Conference (see PPG Appendix).[13] Curiously, moreover, in the next breath (Br. 37 n.36) PPG admits the statement it attributes to the Conference is erroneous.

5. PPG's due process challenge (Br. 59-60) is without merit. First, PPG has had a "reasonable opportunity to be heard and present evidence" under EPA's determination procedure (40 C.F.R. 60.5). *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). Second, all persons affected by EPA final actions under the Act have ample time to file review petitions. Indeed, the period for filing them does not even begin to run until EPA publishes notice in the Federal Register of its action. Third, even where the Act does not require formal proceedings, the agency may not

[13]PPG contends that the technical amendments would not have been necessary under our construction. The same, however, is equally true of PPG's construction inasmuch as PPG contends all (but one) of the specifically enumerated items in the technical amendments were already covered by the "final action" clauses. As we pointed out at pages 22-23 (note 17) of our opening brief, however, it is not fatal to our (or PPG's) argument that Congress indulged in some redundancy to make sure certain actions were reviewed in one circuit rather than another.

arbitrarily and unreasonably refuse to consider any information a party may wish to offer in support of its position, and any such refusal may render the agency's final decision arbitrary and capricious. 5 U.S.C. 706(2). It is therefore highly unlikely that any final agency action may ever be taken and affirmed on preenforcement review under the Act in violation of due process. Finally, if any such denial of fair procedure ever does occur, there will be time enough to determine the constitutionality of the preclusion clause at that time. In such a case, the remedy would be invalidation of the preclusion clause as applied, not a modification of the scope of Section 307(b)(1).[14]

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[14]The special statutory problem involved in *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 913 (D.C. Cir. 1979), justified that court's reference to the potential due process question. Although the Noise Control Act, 42 U.S.C. 4915(a), has a preclusive review provision like that in the Clean Air Act, only specific enumerated sections in the Noise Act are subject to preenforcement review. 42 U.S.C. (Supp I) 4915(a). The problem in *Chrysler* was that the Administrator decided that certain regulations were in fact within the ambit of the review provisions of the Noise Act only after the period for review had expired. To avoid the constitutional issue, the ambiguous list of enumerated actions was construed not to include the regulations. This problem cannot arise under the Clean Air Act because of the addition of the "any other final action" clause and the protection of Federal Register publication.

None of the decisions (PPG Br. 44-45) construing the pre-enforcement-review provisions of other environmental statutes are relevant because none of them contain the critical "any other final action" clause. The pre-amended version of the Clean Air Act, the Federal Water Pollution Control Act, 33 U.S.C. 1369(b)(1), and the Noise Act, 42 U.S.C. 4915(a), authorize original preenforcement review in the courts of appeals only for specifically enumerated actions. See *Utah Power & Light* v. *Environmental Protection Agency*, 553 F. 2d 215, 218-219 (D.C. Cir. 1977) (pre-amended Clean Air Act); *Crown Simpson Pulp Co.* v. *Costle*, 599 F. 2d 897, 900 (9th Cir. 1979) (Federal Water Pollution Control Act Amendments of 1972); *Chrysler Corp.* v. *Environmental Protection Agency*, 600 F. 2d 904, 907 (D.C. Cir. 1979)) (Noise Control Act). In addition, no court of appeals other than the Fifth Circuit has declined jurisdiction under Section 307(b)(1) of the Clean Air Act on the theory advanced below.

For these reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for consideration of the merits.

Respectfully submitted.

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